Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

FRANCISCO H. GUZMAN, PETITIONER PRO SE

vs.

DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANCISCO H. GUZMAN, PRO SE
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QUESTIONS PRESENTED

This case is a continous 19 year effort by a Pro Se Petitioner to set aside a Void final judgment rendered by an unauthorized hearing officer given Retroactive subject matter jurisdiction in violation of the ex post facto clause in the United States Constitution and the petitioner's constitutional due process rights. These issues never having been addressed by the Department of Justice and the courts.

1 - Does an appellate court with statutory subject matter jurisdiction of review and ruling they lack subject matter jurisdiction to deny review of a Rule 60(b) motion to set aside a Void final decision[1] denied Rule 60(b) review below, unless ordered to do so by a court of competent jurisdiction, without first making an inquiry of the facts and granting the respondent a waiver of Federal Circuit Rule 27(d), thereby enabling the respondent to evade any response to the validity of the original final decision deny the PRO SE petitioner due process when other federal courts of appeal have ruled subject matter jurisdiction confers ancillary jurisdiction to review?

2 - When the respondents attorney ill defines the full authority of the MSPB clerks to obtain a dismissal for lack of jurisdiction by the court and the PRO SE petitioner furnishes the court with a copy of a MSPB regulation wherein the Executive Director of the Merit System Protection Board (MSPB) delegates the authority to rule on case related pleadings, deny non certified interlocutory appeals and issue letters responding to requests for reconsideration or reopening of cases to their clerks. Should a court exercise its ancillary jurisdiction to review the legitimate actions of the MSPB clerk?

3 - Should an appellate judge deny a motion for reconsideration made to the original deciding panel under Rule 40 Fed. R. App. P., when that judge was NOT on the original panel notifying the clerk they would reconsider the case under rule 40, supra?

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[1] This court should review the Void final decisions made by James R. Bland a Regional Director for the Drug Enforcement Administration (DEA) shown in Appendix E to this petition. The Void final judgment by Department of Justice (DOJ) hearing officer Richard A. Cooter is reported in appendixes F and G to this petition. The Void decision by Ira Harrison, Appeals Officer for the Federal Employees Appeal Authority (FEAA), now the Merit Systems Protection Board, upholding Cooter's Void decision is reported in appendix D of this petition.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. 1

OPINIONS BELOW. 2

JURISDICTION. 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 3

STATEMENT OF THE CASE. 3

REASONS FOR GRANTING THE WRIT. 7

CONCLUSION. 13

INDEX TO APPENDICES

Appendix A. .Unpublished Order of the Court of Appeals denying petitioner's motion for reconsideration issued August 22, 1994.

Appendix B. . Unpublished Order of the Court of Appeals dismissing petitioner's appeal for lack of Subject Matter Jurisdiction and granting Respondent's motion to waive Federal Circuit Rule 27(d) issued September 30, 1992.

Appendix C. .Unpublished Letter from the Clerk of the MSPB, acting on the delegated authority to deny appeals, and denying the Petitioner's Rule 60(b) motion to Relieve the Petitioner of a Final Judgment of the Federal Employees Appeal Authority under case number AT752B60379 issued June 9, 1992.

Appendix D. . A copy of page 4 of the invalid decision of Ira R. Harrison, United States Civil Service Commission Federal Employees Appeals Authority (the FEAA, and the predecessor of the Merit Systems Protection Board.

Appendix E. . .A copy of the void final decision by James R. Bland, DEA Regional Director dismissing the petitioner from employment.

Appendix F. . .A copy of pages 2 through 5 of the unpublished void adjudicatory decision (Report and Recommendation) of Richard A. Cooter, Department of Justice Hearing Officer.

Appendix G. . .A copy of pages 9 through 12 of the certified official transcripts of the hearing conducted by Hearing Officer Richard A. Cooter.

Appendix H. .A copy of the proposal (the charge against the petitioner) by DEA Deputy Regional Director Kenneth A. Miley.

Appendix I. . . Article 1, Section 9, Clause [3] to the United States Constitution.

Appendix J. . . Amendment V to the United States Constitution.

Appendix K. .Amendment XIV, Section 1 to the United States Constitution.

Appendix L. Section 0674, Discipline, Adverse Actions, Grievances, and Appeals of the Drug Enforcement Administration, United States Department of Justice Administrative Manual dated 1-15-74.

Appendix M . .A copy of management's exhibit # 9 from the official transcripts of the DOJ hearing conducted by Hearing Officer Richard A. Cooter which is supplemental Transmittal # 132, citing a table of changes in Chapter number 06 of the DEA Administrative Manual giving Hearing Officer Cooter, RETROACTIVE subject matter jurisdiction.

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Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215 [8th C.C.A. 1942]. 11, 12, 13

Ellerd v. Southern Pacific Railroad Co., 241 F.2d541 [7th C.C.A. 1957]. 7, 8

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Marshall v. Board of Education, Bergenfield, N.J., 575 F.2d 417 [3rd C.C.A. 1974]. 9

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Samuel J. Jordon et al v. John J. Gilligan et al, 500 F.2d 701 [6th C.C.A. 1974]. 9, 10, 11, 13

Vitarelli v. Seaton, Sec. of the Interior, et al, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 [1959] 10, 12

STATUTES:

United States Code

Title 28, Section 1254(1). 3

Title 28, Section 1295. 3

Title 28, Section 1295 (a)(9). 3, 6

Code of Federal Regulations

Code 5, Section 1201. 3

Code 5, Section 1201.10(i). 6

Code 5, Section 1201.12. 6

Code 5, Section 7703 . . . . . .3, 6

Code 5, Section 7703(b)(1). 3

Code 5, Section 7703(d). 3

Rules of Appellate Procedure

Rule 27(d). 2, 5, 12

Rule 40. . . . . .7, 12

Rules of Federal Civil Procedure

Rule 60(b). 1, 2, 5, 10, 11, 12

Rule 60(b)(4). 8

United States Constitution

Article 1, Section 9, Clause 3. . . . . 1, 3, 7, 8

Amendment 5. . . . . .3, 7

Amendment 14, Section 1 . . . . . 3, 7

Administrative Procedures Act. 9

Drug Enforcement Administration Administrative Regulations

Discipline, Adverse Actions, Grievances and Appeals

Section 0674. . . . . 3, 5, 9

Section 0674, Supplemental Transmittal # 132. 4

Section 0674.51. 8

Section 0674.72(B). 4

Section 0674.72(B)(1)(2). 8

Section 0674.72(C)(1). 4

Section 0674.72(E)(2). 8

Section 0674.72(G). 9, 13

Merit System Protection Board

Delegation of Authority Manual

Transmittal No. 1110.14 dated February 27, 1991

Appendix C-2. . . . . .6, 10

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

FRANCISCO H. GUZMAN, Petitioner PRO SE

vs.

UNITED STATES DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Francisco H. Guzman, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Federal Circuit denying subject matter jurisdiction to review a refusal by the Merit System Protection Board (MSPB, the Board) to review a Rule 60(b) motion. When the petitioner's motion requests the Board set aside a VOID final decision made as the direct result of a decision by an unauthorized Hearing Officer granted retroactive subject matter jurisdiction in violation of Article 1, Section 9, Clause [3] of the United States Constitution and in opposite to the regulations of the Drug Enforcement Administration (DEA). Other circuit courts of appeals have ruled when they have

original subject matter jurisdiction of review they have ancillary jurisdiction to review. The appellate decision to deny review was made by the original panel without requiring the respondent's attorney to file a brief addressing the validity of the original final decision. A timely filed motion for reconsideration was denied by a circuit court judge who was not a member of the original deciding panel. These decisions deny the petitioner due process of law given other federal employees.

OPINIONS BELOW[1]

The unpublished order of Court of Appeals Circuit Judge Giles S. Rich denying the petitioner's motion for reconsideration appears in Appendix A to this Petition. The unpublished opinion of the Court of Appeals dismissing the Petitioner's appeal for lack of Subject Matter Jurisdiction and granting Respondent's motion to waive Federal Circuit Rule 27(d) appears in Appendix B to this Petition. An unpublished letter from the Clerk of the Merit Systems Protection Board, acting on the clerk's delegated authority to deny appeals, and denying the Petitioner's Rule 60(b) motion to Relieve the Petitioner of a Final Judgment of the Federal Employees Appeal Authority under case number AT752B60379 appears in Appendix C to this Petition. Page 4 of the invalid decision of Ira R. Harrison, United States Civil Service Commission Federal Employee Appeals Authority (the FEAA and the predecessor of the Merit Systems Protection Board (MSPB) appears in Appendix D to this Petition.[2] The VOID final decision of Drug Enforcement Administration (DEA) Regional Director James R. Bland appears in Appendix E to this Petition. Pages 2 through 5 of the unpublished VOID ajudicatory decision (Report and Recommendation) of Richard A. Cooter, Department of Justice Hearing Officer appears in Appendix F to this Petition.[3] A copy of pages 9 through 12 of the certified official transcripts of the hearing conducted by Mr. Cooter is included, for clarification of Cooter's adjudicatory decision, in Appendix F supra, as Appendix G to this Petition. The proposal by DEA Deputy Regional Director Kenneth A.

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[1] All of the orders, reports and recommendations, transcripts, records, regulations listed in the appendices to this petition are included in the official and original records of this case.

[2] The full decision was transmitted to the C.C.A. for the Federal Circuit by the MSPB in lieu of a certified index.

[3] The full decision is available for review upon request.

Miley (the charge against the Petitioner) appears in Appendix H to thisPetition[4].

JURISDICTION

The Court of Appeals' Opinion by the judges in the panel assigned this matter was filed on September 30, 1992. A timely Petition for Reconsideration was filed on October 2, 1992. The Court of Appeals' denial of the Petition for Rehearing by a judge not on the deciding panel was issued on August 22, 1994 and is set forth in Appendix A to this petition. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 9, Clause [3] to the United States Constitution is set forth in Appendix I. Amendment 5 to the United States Constitution is set forth in Appendix J. Amendment 14, Section 1 to the United States Constitution is set forth in Appendix K. Section 0674, Discipline, Adverse Actions, Grievances, and Appeals of the Drug Enforcement Administration, United States Department of Justice Administrative Manual dtd 1-15-74 is set forth in Appendix L.

STATEMENT OF THE CASE

The United States Court of Appeals for the Federal Circuit, has jurisdiction to review decisions of the Merit Systems Protection Board (MSPB or Board) from two sources in the United States Code: 28 U.S.C.S. § 1295 and 5 C.F.R. § 7703. Section 1295 of title 28 provides in part:(a)(9): The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdition of an appeal from a final order or final decision of the Merit Systems Protection Board, Pursuant to sections 7703(b)(1) and 7703(d) of title 5. emphasis added. The court of appeals has ancillary jurisdiction over any matter it has original subject matter jurisdiction. Under the Civil Service Reform Act of 1978, 5 C.F.R. 1201, the MSPB is the predecessor of the Federal Employees Appeal Authority (FEAA). The court of appeals can also review decisions made by the FEAA.

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[4] The proposal included as an enclosure a copy of subsection 0674.72 (Hearings) of the DEA Administrative Manual. A copy of the entire section 0674, which includes subsection 0674.72, and its table of contents is attached for the courts use under appendix L as part of the statutory provisions involved in this case.

On April 2, 1975, the Petitioner received a Proposal from Kenneth A. Miley, a DEA Deputy Regional Director dated March 31, 1975, to dismiss the Petitioner based on a charge of conflict of interest. The petitioner was a career civil service employee and a 10 point disabled Veteran with full civil service status and 19 years of honorable federal service. Miley's proposal gave the Petitioner the unconditional right to request a hearing by an Administrative Law Judge under subsection 0674.72(B) of the DEA Administrative Manual. A copy of the entire DEA regulation is attached to this Petition as Appendix L.

By letter dated April 7, 1975, K. L. Dickinson the DEA Acting Employee Relations Officer requested Mr. Robert Smith Director of Personnel at the Department of Justice (DOJ) appoint an Administrative Law Judge to conduct a predecision hearing regarding the proposed removal of the Petitioner.[5] All the above requests for a hearing before an administrative law judge are in conformity with DEA Regulation 0674.72(C)(1).

By letter dated April 22, 1975, Richard A. Cooter notified the appellant's representative of his appointment as the Hearing Officer in this case. emphasis added. Mr. Cooter was the Chief of Labor Management Relations in the Bureau of Prisons, DOJ. Mr. Cooter set the hearing date for 9:00 am on May 14, 1975. The petitioner's representative objected to Mr. Cooter, the DEA and the DOJ that Mr. Cooter was not an Administrative Law Judge and lacks subject matter jurisdiction to conduct this hearing. On the morning of May 14, 1975, a hearing was opened by Richard A. Cooter at the offices of the U.S. Bureau of Prisons, 320 First Street, N.W., Washington, D.C. and an official transcript of the proceedings was made by a reporter of the Hoover Reporting Company, Inc., Official Reporters, Washington, D.C. 546-6666.[6]

During the May 14, 1975, hearing the Petitioner and his representative were given a copy of Management's exhibit # 9. This was a copy of a Supplemental Transmittal # 132, citing a table of changes in Chapter number 06 of the DEA Administrative Manual. A retroactive pen and ink change to the DEA Administrative manual, dated 4-29-75. This change deletes the title "Administrative Law Judge" wherever it appears in the DEA Administrative Manual under

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[5] A copy is attached to the petitioner's brief in the case below , 92-3517, as Appendix 2.

[6] Appendix G to this petition contains pages 9 through 12 of the transcripts of this hearing. The full transcripts are available for review upon request.

Section 0674 and inserts the new title of "Hearing Officer". A copy of this regulation is attached to this Petition as Appendix M. The Petitioner's representative made an immediate objection to the retroactive change and her objection is recorded in the official transcripts of the hearing.[7]

The petitioner appealed the Void final decision to the United States Civil Service Commission Federal Employees Appeals Authority (the FEAA) and the prececessor to the Merit Systems Protection Board. On July 30, 1976, Ira R. Harrison, FEAA Appeals Officer upheld a collusive Constitutional violation of the ex post facto clause under Article 1, Section 9, Clause [3] of the United States Constitution by officials of the DEA and the DOJ giving Richard A. Cooter Retroactive Subject Matter Jurisdiction to adjudicate this case.[8]

On June 1, 1992, the petitioner continued to seek review and filed a Rule 60(b) motion with the MSPB to set aside the above Void judgment. By letter dated June 9, 1992, the appellant's motion to set aside was denied by a clerk of the Board signing for Robert E. Taylor, the MSPB clerk.[9] This clerk stated he was directed by Board Chairman Daniel Levinson to respond to the petitioner's motion. The clerk denied the petitioner's motion to set aside. It stated the Board would not reopen or reconsider this matter unless ordered to do so by a court of competent jurisdiction and the Board considers this matter closed. emphasis added. On June 29, 1992, the petitioner filed a Petition for Review with the United States Court of Appeals for the Federal Circuit. On September 10, 1992, the government filed a brief titled Respondent's Motion to Dismiss and to Waive Fed. Cir. R. 27(d). emphasis added. The government also filed a motion dated September 28, 1992, titled Respondent's Opposition to Petitioner's Motion for Leave to Respond to Respondent's motion to dismiss. In part both motions state. Under the Board's regulations, the clerk of the Board does not have the authority to issue final decisions of the board. Board regulations specify only that the clerk is part of the staff that assists the board in carrying out its work. In doing so, the clerk enters petitions for review and original jurisdiction cases onto the board's docket and monitors their processing; gives information on the status of cases, manages the board's records, reports, and

[7] See appendix G for a copy of the objection.

[8] See Appendix D for a copy of page 4 of this decision. The full decision has been furnished the CCA for the Federal Circuit by the MSPB.

[9] See Appendix C for a copy of this letter.

correspondence style and control programs; and answers requests under the Freedom of Information and Privacy Acts. See 5 CFR 1200.10(i). Without authority to issue a final decision, the clerk could not possibly do so, even assuming, for argument purposes only, that the chairman of the board directed the clerk to do so. The governments briefs totally evade any response to the complaint concerning the validity of the original final judgment and decision to terminate the petitioner by the DEA and the DOJ.

By order dated September 30, 1992, signed by the Clerk of the Court for Judges Newman, Circuit Judge, Cowen, Senior Circuit Judge, and Michel, Circuit Judge, Per Curiam. The order reads in part. Pursuant to 5 U.S.C. § 7703 and 28 USC § 1295(a)(9), this court has jurisdiction to review final decisions of the Board. Guzman has not shown that § 7703 governing judicial review of final Board decisions embraces review of letters by the Clerk of the Board stating that the Board will not reopen a case.

On October 2, 1992, the PRO SE petitioner filed a timely petition for rehearing and motion to stay combined with a suggestion for a rehearing in banc. The basis for this request was the board had previously issued written orders delegating to their clerk the authority to rule on motions and pleadings. Thus the denial letter is in fact a denial of a motion by the board and is a matter clearly governed by 5 CFR 7703. The petitioner then advised the court the attorney for the board required a freedom of information request to release this delegation of authority and asked for a stay of the mandate.

On October 17, 1992, the petitioner filed a motion with the court titled as a motion in support of his petition for rehearing and motion to stay combined with a suggestion for a rehearing in banc. The Petitioner stated under 5 CFR 1201.12, the board may delegate their authority to the clerk of the board. He attached to his motion as an exhibit a copy of the MSPB Delegation of Authority Manual Transmittal No. 1110.14 (February 27, 1991). Specifically, appendix C-2. The Delegation of authority to the Clerk of the Board from the Executive Director.. The petitioner requested the court take notice of page 1, part 2 wherein the clerk of the board is delegated authority to perform ministerial functions for the board in connection with proceedings before it, and these specific authorities to act on motions and other filings or requests are listed below. Particular attention should be directed to part (a) which allows the clerk to rule on case relate pleadings. Including the denial of non certified interlocutory appeals and the issuing of letters responding to requests for reconsideration or reopening. emphasis added.

On August 22, 1994, Circuit Judge Giles S. Rich of the U.S. Court of Appeals for the Federal Circuit filed an Order denying the petitioner's motion for reconsideration.[10] Judge Rich was not a member of the original panel to whom the motion for reconsideration was directed under the provisions of Rule 40 Fed. Rules Civil Procedure.

REASONS FOR GRANTING THE WRIT

Since 1975, the PRO SE petitioner has continuously sought review of the Void final decision resulting in his invalid termination. The DOJ attorneys always evade any response to the issue of a void final decision by simply ignoring it. Their only response to the Board and the courts is "they lack jurisdiction to review this case under the doctrine of res judicata". Because the petitioner is PRO SE the Board and the courts always grant the government attorneys request to dismiss and have never made an inquiry of the Void final judgment. They all penalize the PRO SE petitioner by not giving him the same construction of law given a petitioner represented by an attorney. In order for the doctrine of res judicata to apply to the petitioner's case, the DEA hearing officer whose judgment is asserted as an adjudication, must have been one of competent jurisdiction.[11] There has never been a valid final decision in this particular case. The attorneys for the DOJ are intentionally covering up a collusive Constitutional violation of the ex post facto clause under Article 1, Section 9, Clause [3] to the United States Constitution by officials of the DEA and the DOJ. Wherein these DEA and DOJ officials intentionally gave Hearing Officer Cooter RETROACTIVE subject matter jurisdiction to adjudicate the petitioner's case. The official records and transcripts of the petitioner case show repeated objections to the lack of subject matter jurisdiction by Hearing Officer Cooter to adjudicate this case. The fraudulent actions of the DOJ attorneys have denied the petitioner his right to equal protection under the law and his rights of due process under the Fifth and Fourteenth Amendment, Section 1 of the United States Constitution. These actions by the attorneys for the DOJ constitute a fraud upon the Board and the courts.

The Administrator of DEA is required to establish procedures insuring that employees are advised of their rights under DEA, DOJ

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[10] See Appendix A to this petition.

[11] See Ellerd v. Southern Pacific Railroad Co., 241 F.2d 541 [7th C.C.A .1957].

and CSC regulations.[12] The DEA regulations entitle each employee upon request, to one hearing before an Administrative Law Judge on a proposed adverse action. This request must be made in writing and may not be conditional[13] emphasis added. The retroactive change to the specific right of an adjudicatory hearing conducted by an Administrative Law Judge, after the process had already begun, clearly takes away vested rights of due process given to the petitioner by the DEA Administrative Manual. The DEA and DOJ should not be allowed to RETROACTIVELY affect a proceeding already in progress; and the FEAA has no right to uphold a violation of the United States Constitutional by the DEA and the DOJ.

The petitioner was required to take part in the May 14, 1975, DEA hearing or be cited for contumacious behavior.[14] The petitioner's objections are cited in the official transcripts of the DEA hearing on pages 9 through 12, where Mr. Cooter admits he is NOT an AdministrativeLaw Judge. Hearing Officer Cooter again addresses his lack of subject matter jurisdiction in his Report and Recommendation. Hearing Officer Cooter identifies what is in fact a retroactivegranting of subject matter jurisdiction and a violation of Article 1, Section 9, Clause [3] of the United States Constitution as being only a harmless procedural error. It has been ruled mere error does not render a judgment void, for purposes of obtaining relief from the judgment under Rule 60(b)(4), unless the error is of constitutional dimension emphasis added.[15] In Cooter's opinion whether the person conducting the hearing is an administrative law judge or a grievance examiner makes no real difference. Hearing Officer Cooter states "in any event Mr. Guzman through his representative, waived his rights to object to my hearing the case". This waiver is not true and in any event, even if it were, the petitioner cannot waive subject matter jurisdiction.[16] Hearing Officer Cooter ignores jurisdiction cannot be conferred by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising jurisdictional

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[12] See DEA Administrative Manual 0674.51

[13] See DEA Administrative Manual 0674.72(B)(1)(2).

[14] See DEA Administrative Manual 0674.72(E)(2).

[15] See Klugh v. United States, 620 F. Supp. 892 [D.C.S.C. 1985]

[16] See Goldstone v. Payne, 94 F.2d 855 [2nd C.C.A. 1938]; Ellerd v. Southern Pacific Railroad Co., 241 F.2d 541 [7th C.C.A. 1957].

question by any form of latches, waiver, or estoppel.[17] These statements are also cited on pages 4 and 5 of Mr. Cooter's official Report and Recommendation dated July 9, 1975.[18] An Administrative Law Judge without subject matter jurisdiction faced with the above regulatory change giving him retroactive subject matter jurisdiction would have dismissed the case and required DEA issue a new proposal under the new regulatory change which became effective on April 29, 1975.

The judgment in the Report and Recommendation of Hearing Officer Cooter is Void.[19] A judgment may be void, and therefore subject to relief under federal rule, if the court that rendered it lacked jurisdiction of the subject matter or the parties or entered "a decree which is not within the powers granted to it by the law". emphasis added. Hearing Officer Cooter is not the Administrative Law Judge required by DEA Administrative Manual 0674 to conduct the adverse action hearing in the petitioners case. An Administrative hearing conducted by an unauthorized officer is invalid.[20] The original final decision made by DEA Regional Director James R. Bland[21] is Void. A void judgment is no judgment at all and is without legal effect.[22]. Bland is required by DEA regulations to give full consideration to the Report and Recommendation of an Administrative Law Judge before making his original final decision.[23] emphasis added. Once having determined to entertain complaint, agency assumes obligation to assure that proceeding satisfies basic procedural requirements set forth in its own regulations and in Administrative Procedure Act; and whatever would be their standing in court of law on merits of matter before agency, participants in agency action have undeniable interest in seeing to it that procedural rights guaranteed them by law are respected. The agency is bound to obey its own rules.[24] The

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17 See Page v. Wright, 116 F.2d 449 [7th C.C.A. 1940].

18 See Appendix F and G to this petition.

19 Marshall v. Board of Education., Bergenfield, N.J., 575 F.2d 417 [3rd C.C.A. 1978].

20 See Director, Office of Workers' Compensation Programs, U.S. Dept of Labor v. National Mines Corp., et al 554 F.2d 1267 [4th C.C.A. 1977].

21 See Appendix E to this petition.

22 See Samuel J. Jordon et al, v. John J. Gilligan et al, 500 F.2d 701 (6th C.C.A. 1974)

23 See DEA Administrative Manual 0674.72(G).

24 See Gardner v. F.C.C. 530 F.2d 1086 [District of Columbia C.C.A. 1976].

Supreme Court of the United States has previously ruled Agencies are bound to follow their own disciplinaryregulations.[25] The decisions of the United States Supreme Court rendered by written opinions are binding on all courts, state and federal; the Court's holding is stare decisis and cannot be overruled except by the Court itself; even the Court's dictais of persuasive precedential value.[26]

The United States Court of Appeals for the Federal Circuit has previously ruled claims for relief from a judgment obtained by fraud or misrepresentation should be directed to the court where the judgment was obtained as that court is the victim of that fraud.[27] On June 1, 1992, the petitioner filed a petition with the Merit Systems Protection Board to relieve the petitioner of a Final Judgment of the Federal Employees Appeal Authority under case number AT752B60379. The MSPB has previously ruled Rule 60(b) does not limit the power of a court or the Board to entertain an independent actionto relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court or the Board. Thus allowing them to set aside time limits, the finality of decisions and the res judicatabar.[28] When the Clerk of the MSPB stated the Board will not review a matter it considers closed, the petitioners motion of appeal. The Board is not claiming res judicata, as the doctrine of res judicata does not preclude a litigant from making a direct attack, as by way of motion to vacate, on a judgment before the court which rendered it under the Federal Rules of Civil Procedure, Rule 60(b), 28 U.S.C.A..[29] When the clerk of the MSPB, acting for the Board,[30] refused to allow a review of the petitioner's rule 60(b) motion, the clerk violated the petitioners rights of due process of law. A refusal by an administrative agency to receive and consider

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[25] See Vitarelli v. Seaton, Sec. of the Interior, et al 359 US 535, 3 L.Ed.2d 1012, 79 S.Ct 968 [1959].

[26] See Samuel J. Jordon et al, v. John J. Gilligan et al, 500 F.2d 701 (6th C.C.A. 1974)

[27] See Rocovich v. U.S. 933 F.2d 991, note # 6 [C.C.A. Federal Circuit 1991].

[28] See Anderson v. Dept. of Transportation., F.A.A., 46 M.S.P.B. 341 [1990]; Alfred J. Kissel v. U.S. Postal Service, 42 M.S.P.B. 154 [1989].

[29] See Samuel J. Jordon et al, v. John J. Gilligan et al, 500 F.2d 701 (6th C.C.A. 1974)

[30] A complete copy of the MSPB Delegation of Authority Manual Transmittal No. 1110.14 (February 27, 1991), appendix C-2 is attached to petitioner's motion for reconsideration. It shows the cited Delegation of authority to the Clerk of the Board from the Executive Director, supra.

competent and material evidence offered by a party to a proceeding before it amounts to a denial of "due process of law'.[31] A party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of a failure to object prior to, or at time of, entry of judgment. A Void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. Federal Rules of Civil Procedure Rule 60(b), 28 U.S.C.A.[32]

The petitioner appealed the decision made by the clerk of the MSPB for the Board to the United States Court of Appeals for the Federal Circuit. A grant of jurisdiction over particular subject matter includes the power to adjudicate all matters ancillary to that particular subject matter, and in this regard, the word "ancillary" means auxiliary, accessorial or subordinate.[33] All courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction. The "Ancillary jurisdiction" theory of federal courts means that once federal jurisdiction properly attaches to the primary case the court also has jurisdiction over certain subsidiary or subordinate disputes even though it might not independently be able to proceed to adjudicate them. "Ancillary jurisdiction" should attach where: (1) ancillary matter arises from same transaction which was basis of main proceeding, or arises during course of main matter, or is an integral part of main matter; (2) ancillary matter can be determined without a substantial new fact finding proceeding; (3) determination of ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) ancillary matter must be settled to protect integrity of main proceeding or to insure that disposition in main proceeding will not be frustrated.[34] The Circuit Court of Appeals has power on proper application to conduct an inquiry for purpose of ascertaining whether the orders of which are subject to review by the court, has accorded to an aggrieved party the full and fair hearing to which he was entitled

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[31] See Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215 [8th C.C.A. 1942].

[32] See Samuel J. Jordon et al, v. John J. Gilligan et al, 500 F.2d 701 (6th C.C.A. 1974)

[33] Glens Falls Indemnity Co. v. U.S. at rel. of Westinghouse Electric Co., 229 F.2d 370 [9th C.C.A. 1955].

[34] See Morrow v. District of Columbia, 417 F.2d 728 [C.C.A. District of Columbia 1969].

as a matter of constitutional right, and all questions touching the regularity and validity of proceedings before an administrative agency are subject to review. A controversy tried before a court or an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. When the Court of Appeals for the Federal Circuit granted the governments motion to waive Federal Circuit Rule 27(d) and NOT file a brief responding to the Void judgment they denied the petitioner due process of law.[35]

Rule 40 of the Federal Rules of Civil Procedure identifies the procedures in a Petition for rehearing. In the practice note heading of action by the court it states in part. When a petition for rehearing is filed, the clerk will transmit copies to the panel that decided the case. The clerk will enter an order denying the petition for rehearing after 10 days unless a majority of the panel agrees to rehear the case and so advises the clerk. emphasis added. If a majority of the panel advised the clerk they would reconsider the case. Then the August 22, 1994, ruling by Judge Rich who was NOT on the panel denying the petitioner's motion was improper. Judges of the same court will not knowingly review, reverse or overrule each other's decisions. Where judges who constituted the Circuit Court of Appeal to which petitions to set aside was finally submitted were not the same judges who originally passed upon the sufficiency of the applications for leave to adduce additional evidence and who denied those applications, the court would not, on final submission of case consider such applications and if court erred in denying an opportunity to prove that the board was not an impartial tribunal, the error was one which properly could be corrected only by the U. S. Supreme Court.[36]

The ruling by the Court of Appeals for the Federal Circuit stating they lack subject matter jurisdiction to review the petitioner's Rule 60(b) motion and appeal is in conflict with the decisions of other United States Courts of Appeal on the same matter , supra.

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[35] See Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215 [8th C.C.A. 1942].

[36] See Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215 [8th C.C.A. 1942].

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. The petitioner has suffered grave financial and emotional loss because of the injustice done to him by the DEA and the DOJ. The original transcripts and records identified in this petition are available for review and can also be obtained from the petitioner. This court should consider REVERSING the original invalid final decision made by James R. Bland as being Void and of no effect because it was not made after full consideration of an Administrative Law Judge's findings and recommendations as required by DEA Administrative Manual 0674.72(G).[37]

DATED: October 8, 1994.

Respectfully Submitted,

Francisco H. Guzman
Petitioner PRO SE
904 Tinnell Lane
Mt. Juliet, Tennessee 37122
615-444-7495

[37] If this court elects not to address the issues presented in this petition at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court opinions in Vitarelli v. Seaton and the opinions in Samuel J. Jordon et al. v. John J. Gilligan et al, 500 F.2d 701 (6th C.C.A. 1974) and Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215 [8th C.C.A. 1942]., supra.

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

92-3517

Francisco H. Guzman,
Petitioner

v.

Department of Justice,
Respondent

ON MOTION

Before RICH, Circuit Judge.

ORDER

Francisco H. Guzman's appeal was dismissed for lack of jurisdiction. Guzman seeks reconsideration.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion for reconsideration is denied.

Aug 22, 1994
Date

"s/_____"
Giles S. Rich
Circuit Judge

cc: Francisco H. Guzman
R. Alan Miller, Esq.

s5

Filed
U.S. Court of Appeal for
the Federal Circuit
August 22, 1994
Francis X. Gindhart
Clerk

Appendix A

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

92-3517

Francisco H. Guzman,
Petitioner

v.

Department of Justice,
Respondent

ON MOTION

Before NEWMAN, Circuit Judge, COWEN, Senior Circuit Judge, and MICHEL, Circuit Judge.

PER CURIAM.

ORDER

Pursuant to the courts' August 24, 1992 order directing the parties to address the issue of whether Francisco H. Guzman's petition for review should be dismissed for lack of jurisdiction, Guzman argues that the court has jurisdiction and the Department of Justice moves to dismiss.

In 1975, Guzman was removed from his position as a criminal investigator with the Drug Enforcement Administration. On appeal the Civil Service Commission upheld the removal. Guzman later sought review of his removal in both the Sixth Circuit and the District of Columbia Circuit. This court dismissed a related case no. 92-3050, on May 28, 1992 wherein Guzman sought review of the regulations under which he was removed.

By letter dated June 1, 1992, Guzman asked the Merit Systems Protection Board to reopen his case. On June 9, the Clerk of the Board informed Guzman by letter that the Board would not reopen

the matter. Guzman petitioned this court for review of the Board's June 9 letter.

Pursuant to 5 U.S.C. § 7703 and 28 U.S.C. § 1295(a)(9), this court has jurisdiction to review final decisions of the Board. In his responses, Guzman acknowledges that the statutory scheme contemplates review only of final Board decisions. However, Guzman argues that the letter is appealable as a denial of a motion to reopen. In the alternative, Guzman asks that we treat his petition for review as a petition for a writ of mandamus. With regard to the former, Guzman has not shown that § 7703 governing judicial review of final Board decisions embraces review of letters by the Clerk of the Board stating that the Board will not reopen a case. Guzman's citations to district court cases are inapposite. The Federal Rules of Civil Procedure and Appellate Procedure specifically encompass post-judgment motions and appeals from the denials thereof. To the extent that Guzman's petition seeks a writ, we decline to grant it. Guzman has not met the strict requirements of showing that his right to a writ is "clear and indisputable." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (19880. Indeed, Guzman is attempting to relitigate a matter that has been reviewed by numerous agencies and courts over the past sixteen years.

Accordingly,
IT IS ORDERED THAT:
(1) The Department of Justice's motion to dismiss granted.
(2) Guzman's petition for writ of mandamus denied.

FOR THE COURT

9/30/92 "s/_____"
Date FRANCIS X. GINDHART
CLERK

cc: Francisco H. Guzman
R. Alan Miller, Esq.

s5

Filed
U.S. Court of Appeal for
the Federal Circuit
August 22, 1994
Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: Sep 30, 1992

U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, D.C. 20419

Clerk of the Board

Francisco H. Guzman
904 Tinnell Lane
Mt. Juliet, TN 37122

June 9, 1992

RE: Corespondence dated June 1, 1992
entitled "Petition to Relieve the
Petitioner of a Final Judgment of the
Federal Employees Appeal Authority under
case number AT752B60379"

Dear Sir:

This is in response to your correspondence dated June 1, 1992, addressed to Chairman Daniel Levinson of the Merit Systems Protection Board. Chairman Levinson has forwarded your correspondence to this office for a response.

Upon review of your submission, it appears that you are attempting to reopen the appeal of the removal action taken by the Department of Justice in 1975. You note that you appealed that removal to the Federal Employees Appeal Authority, which upheld the removal action. You have attempted to challenge that decision further in various courts, but those courts have not reversed the decision, or otherwise remanded the case for further action.

To the extent you are seeking that the Board exercise discretion to reopen this matter, your request is denied. The Board will not reopen or reconsider this matter unless ordered to do so by a court of appropriate jurisdiction. The Board considers this matter closed.

Sincerely,

"s/_____"
for Robert E. Taylor

Appendix C

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
ATLANTA FIELD OFFICE
ATLANTA, GEORGIA 30309

APPEAL OF MR. FRANCISCO H. GUZMAN
UNDER PART 752, SUBPART B OF THE CIVIL SERVICE REGULATIONS
DECISION NUMBER AT752B60379
DECIDED ON JULY 30, 1976

III. ANALYSIS AND FINDINGS

A. PROCEDURES

The appellant contended that the agency violated its regulations regarding pretermination hearings in that the agency's hearing was not conducted by an Administrative Law Judge, as required by the Drug Enforcement Administration's internal regulations.

In this respect, the record shows that the appellant's representative contacted the agency's designated hearing officer sometime before the hearing and was advised that he was not an Administrative Law Judge; that she subsequently decided to proceed with the hearing; although she apparently did not waive the appellant's right to raise a procedural issue with respect to this matter.

The record shows that the agency's hearing officer concluded that, although the failure to have the hearing before an Administrative Law Judge was a violation of the agency's regulations, no fatal procedural error was involved. In this respect, he noted that the appellant was entitled to a fair opportunity to be heard before an impartial third party and that the appellant had indicated that he felt that he had a fair hearing (A.297).

The appellant has failed to show wherein his rights were prejudiced by the agency's failure to designate an Administrative Law Judge to conduct the hearing. Accordingly, we find the procedural error, if one occurred, to be harmless error.

V. DECISION

The removal action is affirmed.

Civil Service Regulation 772.309(b) provides that decisions of the Federal Employee Appeals Authority are final and that there is no further right of Administrative appeal.

For the Commission:

"s/_____"
IRA R. HARRISON
Appeals Officer

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
1001 HOWARD AVENUE - SUITE 1800
NEW ORLEANS, LOUISIANA 70113

July 11, 1975 REGISTERED MAIL

Mr. Francisco H. Guzman
Special Agent
Nashville, Tennessee

Dear Mr. Guzman:

This refers to letter of March 31, 1975 from the Deputy Regional Director, Kenneth A. Miley, which informed you of a proposal to remove you from your position of Criminal Investigator, GS-1811-12, and from the Drug Enforcement Administration.

You were advised in the letter of proposal of your right to reply personally as well as in writing. However, on April 21, 1975 your representative, Mary L. Walker, advised that the response would be given at the hearing. I have given full consideration to the entire adverse action file, the testimony and exhibits contained in the transcript of your hearing held on May 14 and 15, 1975, as well as the report and recommendation of the Hearing Examiner. I find that the charge of conflict of interest as stated in the proposal letter is supported by the evidence and is sustained. Accordingly, It is my decision that you be removed from the Drug Enforcement Administration effective July 17, 1975, since this action will promote the efficiency of the service.

You have the right to appeal this action to the Federal Employees Appeals Authority, U.S. Civil Service Commission, Atlanta Field Office, 1340 Spring Street, N.W., Atlanta, Georgia 30309. You also have a right to a hearing before the Federal Employee appeals authority. In order for your appeal to be considered, it must (a) be in writing, (b) give your reasons for contesting the removal, with such offer of proof and pertinent documents as you are able to submit, and (c) be submitted no later than fifteen calendar days after the effective date of your removal. You may have a representative assist you if you desire.

Appendix E

John G. Prior, Administrative Officer, telephone number (504) 589-2622 or Mrs. Iris P. Marquez, Personnel Officer, telephone number (504) 589-3901 will give you all available information about the appeals procedures if you so desire.

SF-50 covering your removal and other pertinent personnel documents will be forwarded to you at your home address.

Sincerely,

"s/_____"
James R. Bland
Regional Director

HEARING OFFICER'S REPORT AND RECOMMENDATION
IN THE MATTER OF: FRANCISCO H. GUZMAN
DATED: July 8, 1975

excerpted from Page 2:

Mr. Guzman was given the following procedural rights:
4. He was given the right to request a hearing before an administrative law judge prior to any final decision.

excerpted from Page 3:

By letter of April 2, 1975, to Mr. Miley, Mr. Guzman indicated that he had received the proposal and elected to do the following things:
1. He elected to reply in person.
2. He elected that Mrs. Mary Lynn Walker, 8020 New Hampshire Ave., Hyattsville, Maryland 20783, of the American Federation of Government Employees, serve as his representative.
3. he asked for an extension of time to answer the proposal inasmuch as he was preparing to testify before a federal grand jury in Nashville, Tennessee.
4. He elected to have a hearing with the Department of Justice.
5. He asked that any personal reply he was to make be made in Washington, D.C.

By letter of April 2, 1975, Mr. Guzman asked Mr. John Prior to send both him and his representative, Mrs. Walker, a copy of all materials upon which the charge was based.

By letter of April 7, 1975, to Mr. Guzman from Mr. Miley, Mr. Guzman was advised that his request for an extension of time to answer would be considered; however, he was to advise Mr. Miley as to how much time he desired. He was further advised that the Drug Enforcement Administration would take steps to secure an administrative law judge for the hearing, that he could make a personal reply to Mr. Bland, the Regional Director at the New Orleans Regional Office, sometime between April 21 and April 25, 1975, and that the material upon which the charge was based would be made available to him and Mrs. Walker through his supervisor, Mr. Klick, by contacting the Office of

excerpted from Page 4:

Employee Relations in Drug Enforcement Administrations' Headquarters in Washington, D.C..

By letter of April 17, 1975, the undersigned was certified to serve as the examiner to conduct the hearing requested by Mr. Guzman. This certification was from Mr. Robert S. Smith, Director of Personnel for Department of Justice. Sometime shortly thereafter, I received a telephone call from Mrs. Walker inquiring whether I was an administrative law judge. I indicated to her that I was not and as I understand it, she made her objections known to the Drug Enforcement Administration and to the Department of Justice regarding my selection. By letter of May 9, 1975, to the undersigned from Jeffery D. Spinks signing for Mr. Robert S. Smith, Director of Personnel and Training, the Justice Department took the position that I had been assigned in accordance with their regulations and that their regulations precluded further delegations to subordinate organizations, such as the Drug Enforcement Administration, of the authority to modify the procedures in predecision hearings.

The Drug Enforcement Administration's

excerpted from Page 5:

regulations in effect at the time Mr. Guzman was given his notice of proposed removal provided that an employee in such a case would have the right to a hearing before an administrative law judge. Inasmuch as I am not an administrative law judge, I believe that a procedural error has occurred. (In this connection the Drug Enforcement Administration has since changed their regulations regarding this matter. See Mgt Exhibit 10). I find, however, that this error has not in anyway prejudiced Mr. Guzman's rights. The essence of the right to a pretermination hearing is the right to have an impartial third party view the facts and evidence and review the procedures involved. Whether that person be an administrative law judge or a grievance examiner, in my opinion, makes no real difference. The essence is a fair opportunity to be heard. Mr. Guzman was given this opportunity and indicated that he felt that he had a fair hearing (TR 297). In any event Mr. Guzman, through his representative, waived his rights to object to my hearing the case (TR 12).

Based on the foregoing, I find that Mr. Guzman was given all of the procedural rights to which he was entitled in the action.

"s/_____"
Richard A. Cooter

TRANSCRIPTS OF PROCEEDINGS
DEPARTMENT OF JUSTICE
ORIGINAL
TRANSCRIPT OF PROCEEDINGS

DRUG ENFORCEMENT ADMINISTRATION

In the Matter of:)
) Adverse Action Proceeding
FRANCISCO H. GUZMAN)

Washington, D.C.
May 14, 1975

Pages 1 thru 149

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D.C.
546-6666

excerpted from Page 9:

HEARING OFFICER COOTER: Management's Exhibit 9 is a transmittal to the DEA Administrative Manual, dated 4-29-75, which requires that a pen and ink change be made to the DEA adverse action regulations wherein the title Administrative Law Judge is deleted, where it appears the title Hearing Examiner is inserted in its place.

Mrs. Walker?

MRS. WALKER: I do have an objection for that being introduced as a document for this hearing and I object to its being used because it is after the fact. I also want to raise another objection on the administrative manual in the next exhibit.

HEARING OFFICER COOTER: Well, O.K., let's deal with this one that we have before us right now.

Mr. Anderson?

MR. ANDERSON: Well, Mr. Cooter, my position with respect to this document of course is that it is a correction of the administrative manual as it so indicates and it is

excerpted from Page 10:

based on the Department of Justice position in respect to our manual that their procedures pre-empt our language in the administrative manual and that is why this correction on this document is being presented here to clear up that matter.

HEARING OFFICER COOTER: I am going to accept the document and give it what weight I think it deserves in this. In this connection I would like the record to show that I am in receipt of a letter dated May 9, 1975, from Mr. Jeffrey D. Spinks signing for Mr. Robert S. Smith, Director of Personnel, for the Department of Justice, in which they outline their position as to whether or not I should hear this case or whether the case should be remanded to an Administrative Law Judge.

The decision that they come to, and they are the people from whom I derive my authority, is that I should hear the case and so in that connection I am going to accept the document just as an indication of what has occurred and give it such weight as I think it deserves.

(The document referred to was marked Management's Exhibit No. 9 for identification and received in evidence.)

HEARING OFFICER COOTER: Management's Exhibit No. 10 is entitled DEA Notice, Classification Code 0674, and the

excerpted from Page 11:

subject is Changes in Appeal System. The document is dated 10-30-74, with a cancellation date of 6-30-75.

Mrs. Walker?

MRS. WALKER: Yes, I wanted to state I did raise an objection to the Drug Enforcement Administration and also to the Department of Justice for not following their own administrative procedures in Code 0674 in appointing what the gave the employee the right of which was an Administrative Law Judge to hear any adverse actions against him. We have no objection, Mr. Cooter, to your hearing this case. My objections were posed to the Justice Department to the Civil Service Commission and to the Drug Enforcement Administration and I felt that it was improper that they not follow their own regulations in this regard, not that it had any attack on you personally as hearing this case. As I say, my objections were raised, but the decision -- we are here today, so the decision is that we have no objection to your hearing the case.

HEARING OFFICER COOTER: O.K.

MRS. WALKER: But I did want my objection to DEA and the Department of Justice not following their own rules and regulations as outlined for the rights and benefits of the employees employed by the agency.

HEARING OFFICER COOTER: Mrs. Walker, I think your point is made for the record.

excerpted from Page 12:

I take it, however, that insofar as my job of finding procedural error, if that occurs, that you are waiving any defect in saying that I should go ahead and hear this case.

MRS. WALKER: That is correct.

HEARING OFFICER COOTER: Thank you.

(The document referred to was marked Management's Exhibit 10 for identification and received in evidence.)

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
1001 HOWARD AVENUE - SUITE 1800
NEW ORLEANS, LOUISIANA 70113

March 31, 1975

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Mr. Francisco H. Guzman
Special Agent
Nashville, Tennessee

Dear Mr. Guzman,

This letter is to notify you that I propose to remove you from your position as Criminal Investigator, GS-1811-12, and from the Drug Enforcement Administration not earlier than 30 days from the date you receive this letter. Based on the charge of conflict of interest, the reasons for which are set forth below, I propose to remove you in order to promote the efficiency of the service.

Specifically while employed as a special agent of the Drug Enforcement Administration assigned to the District Office at Nashville, Tennessee, you established a social, professional and financial relationship with Mr. Arnold Peebles, a practicing attorney in Nashville. As a result of this relationship, on or about May of 1974 you accepted $10,000 in cash from Mr. Peebles knowing full well that he was the attorney of record for two persons accused of controlled substances offenses in cases in which you were involved as an investigator. You have stated to inspectors of the Office of Inspection and Internal Security that Mr. Peebles provided the $10,000 to you as a personal loan, which has bee partially repaid in the amount of $1000.

Moreover on or about May of 1974, under the same circumstances described in the above paragraph, you entered into a business arrangement with Mr. Arnold Peebles, whereby you and Mr. Peebles werre to be partners in a business venture involving the importation and selling of Jade necklaces.

Appendix H

The Drug Enforcement Administration's interest, and hence the public's interest, is in maintaining a high degree of credibility and trust in special agents who are responsible for conducting criminal investigations. The avoidance of even apparent conflicts of interest on the part of special agents through intelligent judgment is indispensable to the maintenance of the high standards imposed on special agents. In your case, the acts specified above have at least created the appearance of giving preferential treatment to Mr. Arnold Peebles and of losing your complete independence and impartiality. This conflict of interest exists even thought there may be no proof that you have in fact resolved any conflict to your or to Mr. Peebles' advantage rather than to that of the Government. Your actions have adversely affected the confidence of the public in the integrity of yourself, the Drug Enforcement Administration and the Government. Furthermore, the ultimate result is that your ability to properly discharge your duties as a special agent have been diminished. Retention of your services as a special agent would further adversely affect discipline and morale, foster disharmony among fellow workers, other police officers, prosecutors and judiciary officials, and impair the efficiency of the Drug Enforcement Administration.

You have the right to review the material upon which this charge is based. You may contact Mr. John Prior, Administrative Officer, New Orleans Regional Office, and he will make this material available to you.

In arriving at my proposal of removal, I reviewed your Official Personnel File and have considered two previous disciplinary actions against you. The first was on March 19, 1972, wherein a suspension of thirty (30) days was imposed on you for notoriously disgraceful conduct. The second was on October 5, 1972, wherein you received a five (5) day suspension for failure to account for evidence seized from a defendant.

If you do not understand the reason for the proposed action, you may communicate directly with me in person, by telephone, or by mail.

You may reply directly to Mr. James R. Bland, Regional Director Region 8, regarding this proposed action in writing, in person, or both, and, you may submit affidavits in support of your reply showing why the action should not be taken. You may have a

representative assist you in this matter if you desire. Any reply you may care to make will be considered in reaching a final decision. You will be given 15 days from your receipt of this letter to present your reply and/or request a hearing under subsection 0674.72 of the Administrative Manual. a copy of which is enclosed.

You will be allowed 8 hours of official time to prepare your reply. Consideration will be given to extending the 15-day and/or the 8 hour periods if you submit a request in writing giving adequate reasons for more time. If you elect a hearing, your request for a hearing and request for advice on how to pursue the hearing should be addressed to me. If you do not desire a hearing, your right to a hearing within the Department of Justice may be forfeited. Mr. John Prior, Administrative Officer, New Orleans Regional Office, will be available to assist you in determining those conditions under which your hearing rights within the Department will be forfeited, and any other technical or procedural information which you might immediately require. As soon as possible after your reply is received, or after expiration of the 15 day limit, if you choose not to reply, a written decision will be issued to you.

Sincerely,

"s/_____"
Kenneth A. Miley
Deputy Regional Director

Enclosure

COPY RECEIVED ON 4-2-75 (Date) at 9:45 am "s/_____"
Francisco H. Guzman. Witnessed by: "s/_____"
Charles J. Klick and "s/_____" Lorraine E. Snyder.

Article 1, Section 9, Clause 3 Constitution of the United States

No Bill of Attainder or ex post facto Law shall be passed. emphasis added.

Appendix I

Amendment V [1791] to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. emphasis added.

Amendment XIV, Section 1 to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdictionthereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any person within its jurisdiction the equal protection of the laws. emphasis added.

DRUG ENFORCEMENT ADMINISTRATION
U.S. DEPARTMENT OF JUSTICE
ADMINISTRATIVE MANUAL
TABLE OF CONTENTS

CHAPTER 06 PERSONNEL MANAGEMENT

Subchapter 067 Personnel Relations and Services (General)

0674 DISCIPLINE, ADVERSE ACTIONS, GRIEVANCES AND APPEALS

0674.1 Purpose
0674.2 Disciplinary Actions
0674.3 Official Time
0674.4 Definition of Terms

0674.41 Adverse Actions
0674.42 Disciplinary Actions
0674.43 Official Time
0674.44 Official Appeal File (OAF)
0674.45 Official Grievance File (OGF)

0674.5 Responsibilities

0674.51 The Administrator
0674.52 The Deputy Administrator, Personnel Director, and Regional Directors
0674.53 Laboratory Directors and Headquarters Supervisors Down to Secion Chiefs
0674.54 First-Line Supervisors
0674.55 Personnel Director or his Designees and Field Personnel Officers
0674.56 Office Responsibilities
0674.57 Employee Relations Officer
0674.58 Other Responsibile Officials
0674.59 Employees

0674.6 Discipline

0674.61 Oral Admonishments
Appendix L

0674.62 Letters of Admonishment
0674.63 Letters of Reprimand
0674.64 Suspensions up to 30 days
0674.65 Appeals

0674.7 Adverse Actions

0674.71 Removal (Including Probationary Removals), Suspensions over 30 days, Reductions in Grade or Rank and Furlough Without Pay for 30 days or less.

0674.72 Hearings

0674.8 Appeals

0674.9 Grievances

0674.91 Actions Covered
0674.92 Informal Procedures
0674.93 Formal Procedures
0674.94 Time Limits

The effective date of this regulation is 1-15-74 as per Supplemental Transmittal No. 89 signed by John R. Bartels Jr., Administrator.

CHAPTER 06 PERSONNEL MANAGEMENT

Subchapter 067 Personnel Relations and Services (General)

0674 DISCIPLINE, ADVERSE ACTIONS GRIEVANCES AND APPEALS.

0674.1 PURPOSE. This section implements Executive Order 10987, Parts 315, 752, and 771 of the Federal Personnel Manual, and Department of Justice Memo 756 dated June 21, 1971, and establishes procedures to be followed in the DEA in connection with discipline, adverse actions, appeals from adverse action decisions, and the consideration and resolution of employee grievances.

0674.2 SCOPE. These procedures set forth direction and guidance to DEA in carrying out its responsibilities for implementing

regulations governing discipline, appeals, and grievance actions, and for assuring effective administration of the appeals and grievance systems. These procedures also define certain authorities regarding disciplinary and adverse actions delegated to DEA officials.

0674..3 POLICY. It is the policy of DEA to administer a personnel program that results in the selection, retention and motivation of a well-qualified and productive work force. As integral parts of that program, DEA maintains high standards of employee performance and integrity, and provided prompt, fair, and equitable solutions to issues which affect employee morale and the efficiency of the service. Employees covered by these procedures will be given full opportunity to respond to proposed adverse actions, to obtain prompt review of adverse action decisions, and to receive prompt consideration of grievances.

0674.4 DEFINITION OF TERMS. The terms used in these procedures are the same as set forth in E.O. 10987, and Parts 315, 752, and 771 of the Federal Personnel Manual.

0674.41 Adverse Actions. Adverse actions are suspensions of 31 days or more; furlough without pay for 30 days or less; reduction in rank, grade or pay; removal; or termination.

0674.44 Official Appeal File (OAF). When an employee files an appeal from an adverse action, the Personnel Office having jurisdiction must establish an official appeal file. This is an independent file, separate and distinct from the Official Personnel Folder. See FPM chapter 771 for a list of thos documents which must be included in the OAF.

0674.46 Deciding Official. The deciding official is that management official authorzed to make the decision on a proposed disciplinary or adverse action under the delegations of authority contained in this subchapter.

0674.5 RESPONSIBILITIES

0674.51 The Administrator. The Administrator will

A. Establish procedures to insure that employees are advised of their rights under DEA, Department of Justice, and CSC regulations.

B. Insure that individual cases are processed within the time limits specified.
C. Require that all proposals and decisions of disciplinary and adverse actions be reviewed by officials who have been trained in the technicalities involved.
D. Make final DEA appellate decisions in adverse action appeals.

0674.52 The Deputy Administrator, Personnel Director, and Regional Directors. These officials have authority to propose and effect disciplinary and adverse actions. The authority to propose and effect disciplinary actions may be redelegated; however, it may not be redelegated to a non-supervisory employee. The authority to propose and effect adverse actions may not be redelegated; however, in the absence of the deciding official, the official designated to act in his absence shall have adverse action authority. Any redelegation of disciplinary authority must be made in writing, and a copy must be forwarded to the Office of Personnel.

0674.55 Personnel Director or his designees and field personnel officers. These Officials will

A. Provide staff advice to officials effecting adverse and disciplinary actions.
B. Review all proposals and decisions of adverse and disciplinary action prior to delivery to the employee to ensure technical and procedural accuracy.

0674.56 Office Responsibilities

A. Office of the Chief counsel will provide legal advice to management. This office may provide management representatives in hearings pertaining to adverse action cases if requested by the deciding official. This office must represent management in the event that an adverse action case goes to civil court, although the civil case will be handled by the concerned U.S. Attorney's Office.
B. Office of Inspection serves as a fact-finding body in matters related to employee performance, conduct, integrity, etc. This Office will not make recommendations on disciplinary and adverse actions to deciding officials. One prime function of this Office is the preparation of Inspection Reports.

0674.57 Employee Relations Officer. This officer sill serve as chief advisor to both supervisors and employees concerning mattersrelated to discipline, grievances, and appeals. He is prepared to advise and counsel any employee who seeks assistance and guidance on any disciplinary matter or work problem. he is available to provide the employee full and complete information on disciplinary and adverse action procedures, employee rights, etc. Members of the Employee Management and Labor Relations Staff are also available to provide advice and counsel as needed.

The Employee Relations Officer will also

A. Advise officials considering disciplinary or adverse actions in matters of precedence and procedures.
B. Maintain DEA records on all disciplinary and adverse actions, including a precedence file.
C. Request assignment of Administrative Law Judges and Grievance Examiners.

0674.58 Other Responsible Officials

C. Employee representatives are those persons designated by the employee willing to act in his behalf regarding a disciplinary or adverse action or a grievance. Any such designations must be made in writing to the deciding official, Administrative Law Judge, as appropriate.
D. An Administrative Law Judge is a trained individual appointed by the Department of Justice to conduct hearings in a fair, impartial, and objective manner. The Administrative Law Judge may not be a regular employee of DEA. The Administrative Law Judge must comply with applicable DEA, Department of Justice, and CSC regulations. He must complete his duties within the time standards established under 0674.72I of this section. He must disqualify himself if prior knowledge of the issue or people involved in the hearing would influence his judgment. The Administrative Law Judge will prepare a report of findings and recommendations and submit this to the deciding official.

0674.59 Employees. Employees are responsible for

A. Being knowledgeable about the regulations pertaining to discipline, adverse actions, appeals, and grievances.

B. Following the regulations detailed in this subchapter.

0674.7 ADVERSEACTIONS

A. Adverse actions may be proposed and effected only by those officials listed in 0674.52.
B. Any official delegated disciplinary authority may recommend in writing an adverse action to an official holding adverse action authority. Any such recommendation shall be made via the established chain of command.

0674.71 Removal (Including Probationary Removals, suspensions of 30 days, Reduction in grade or randk and Furlough without pay for 30 days or less.

A. Proposals

1. These actions must be proposed in writing on official letterhead stationary.
2. This proposal must clearly identify the charge(s), and give sufficient background to the charge(s) to enable the employee to respond to the charge(s); inform the employee where he may review the material upon which the charge(s) are based or attach all such material to the proposal; allow the employee at least 15 days to respond to the charge(s) (except under certain unusual circumstances); inform the employee that he may respond to the charge(s) in writing and/or in person and to whom he is to make his response; inform him of his right to a hearing and to a representative to assist him and the amount of official time that he will be allowed to utilize in making his reply; clearly indicate the letter is a proposal rather than a decision: inform him that his reply will be carefully considered before a final decision is reached; and inform him that the action, if found warranted, will not be effected in less than 30 days (except under certain unusual circumstances.)
3. A copy of this proposal should be filed with the Employee Relations Officer prior to delivery to the employee. A copy must be filed with the Employee Relations Officer with 7 days after delivery to theemployee.
4. Copies of proposed adverse actions and employee's reply, if any, are not filed in the employee's Official Personnel Folder until and unless a disciplinary or adverse action is actually effected.

B. Delivery of the Proposal.

1. Letters of proposal should be delivered in person, read and/or explained to the employee. and witnessed by a third party. In cases where it is difficult or impossible to reach the employee in person, the proposal may be transmitted by registered mail with a return receipt requested..

2. A memo to the file regarding delivery of the proposal should be written. This memo should state when and where the proposal was delivered and by whom the delivery was witnessed. A copy of this memo must be sent to the Employee Relations Officer with 7 days after delivery of the proposal to the employee.

C. Decision Regarding Proposed Adverse Action.

1. An employee has an absolute right to receive a written decision once he has received an official proposal of adverse action. such decisions will be typewritten on official letterhead stationary.

2. Decision letters must include a statement of those charge(s) determined to be valid and why; a statement of those charges(s) dropped and why; a clear statement as to the decision rendered and when it is to take effect; full information regarding his appeal and representation rights; and the individual whom the employee may contact to receive additional information concerning his rights and appeal procedure.

3. A copy of this decision should be filed with the Employee Relations Officer prior to delivery to the employee. A copy must be filed with the Employee Relations Officer with 7 days after delivery to the employee.

4. A copy of this final decision letter, if adverse, is filed on the right-hand side of the employee's Official Personnel Folder.

0674.72 Hearings

A. A hearing will be granted the employee who has received a letter proposing adverse action.

B. Hearing Entitlement.

1. Each employee is entitled, upon request, to one hearing before an Administrative Law Judge on a proposed adverse action. This request must be made in writing and may not be conditional. DEA may deny an employee a hearing on his appeal only when a hearing is impractical by reason of unusual location of other extraordinary

circumstance or when the employee failed to request a hearing offered before the original decision. In the event a hearing is denied, a written statement of the reason for such denial shall be given to the employee and made part of the file.

2. An Administrative Law Judge must be assigned if a hearing is properly requested by an employee, even though the request for a hearing is denied. When no hearing is requested, the deciding official may request assignment of an Administrative Law Judge on his own authority or at the request of the administrator, to review the appeal file and prepare a report of analysis if, in his judgment, such report or analysis would assist the deciding official in reaching the objective decision.

3. An employee in preparing for and participating in a hearing shall have the right to be accompanied, represented, and advised by a representative of the employee's own choosing. The representative may, but need not, be an attorney, or an official of a labor organization. If the representative is a DEA employee, he shall be granted sufficient official time to properly prepare to represent the employee concerned and shall be free from restraint or retaliation on the part of management.

C. Preparation for Hearing.

1. The hearing shall be held before an Administrative Law Judge designated in writing by the Department of Justice. The Employee Relations Officer will request in writing that the Department select a certified Administrative Law Judge to conduct the hearing. All requests for Administrative Law Judges must be directed to the EmployeeRelationsOfficer.

2. The hearing shall be scheduled at the employee's place of work or when this is impracticable, at such place as will minimize travel expenses.

3. As soon as practicable after a hearing is scheduled, the AdministrativeLaw Judge shall notify the employee, the employee's representative (if already designated), and the deciding official in writing as follows:

a. Date, time and place of hearing.

b. Brief statement of the purpose of the hearing.

c. Brief explanation on the conduct of the hearing and order of business.

d. The right of the employee to be accompanied, represented, and advised by a designated representative.

e. The right of the deciding official to designate a representative to act in his or her stead, or to present the case either with or without a representative.

f. The right of either party to request that witnesses be present at the hearing to testify in their behalf.

4. The deciding official will designate the management representative in writing to the Administrative Law Judge. He will also designate an assistant management representative if needed.

5. At the Administrative Law Judge's discretion, he may designate an assistant to the Administrative Law Judge to assist in the administrative duties necessary to prepare for and conduct a hearing.

D. Conduct of Hearings.

1. The purpose of the hearing is to provide the employee with an opportunity to present his or her side of the case personally, or through, or accompanied by, a representative and to provide the same opportunity for the management representative. The hearing should be conducted to develop facts and assemble information and testimony so that the deciding official may have all available information to consider in making a decision.

2. Hearings shall not be open to the general public or to the press. Attendance shall be limited to persons determined by the Administrative Law Judge to have a direct connection with the proposed adverse action.

3. Both the employee and the management representative have the right to request witnesses to testify in their behalf. However, only witnesses whose expected testimony is believed by the Administrative Law Judge to be relevant to the matters at hand shall be called. Insofar as administratively practicable, employees of DEA whose presence as witnesses is requested by the Administrative Law Judge shall be made available for testimony. If management determines that it is impracticable to comply with a request of the Administrative Law Judge to make an employee witness available, the reason for the declination shall be included in the hearing record. If because of distance of similar factors the Administrative Law Judge determines that it is impractical to require the presence of a witness, necessary testimony may be obtained by affidavit or deposition. However, if in the Administrative Law Judge's judgment, the presence of a witness is essential to a full and fair hearing, the hearing may be postponed until such time as the management official complies with the request to produce the witness. Witnesses who are not employees of the

Department of Justice may be invited to testify. If the examiner determines that their testimony and presence is necessary, transportation costs and per diem will be paid by the organization to which the affected employee is assigned. If a witness fails or refuses to appear or to testify the record of the hearing shall so indicate.

4. The hearing shall be recorded and transcribed verbatim. The deciding official is responsible for furnishing a recording secretary, subject to the approval of the Administrative Law Judge. All documents submitted to and accepted by the Administrative Law Judge at the hearing shall be made a part of the record of the hearing. If management submits a document that it accepted, it shall furnish a copy to the employee. If the employee submits a document that is accepted, the employee shall make the document available to the managementrepresentativeforreproduction.

5. The employee (or designated representative) and the management representative will each be furnished a copy of the hearing transcript as soon as practicable after the transcript is completed. The Administrative Law Judge shall instruct the parties as to submission of corrections to the hearing transcript.

E. Termination of a Hearing.

1. An employee's hearing will be terminated if the employee so requests. Such requests should be made in writing to the Administrative law Judge. The employee is encouraged to state briefly the reasons for the request.

2. An unjustified delay, contumacious behavior, or dilatory tactics on the part of the employee or his representative may serve as basis for the termination of a hearing by the Administrative Law Judge. Specifically,when an employee fails to appear, without good cause, for a scheduled hearing; fails without reasonable basis to furnish requested information within specified time limits; repeatedly fails to follow instructions of the Administrative Law Judge; or otherwise unjustifiably delays processing, the hearing may be terminated and the findings and recommendations rendered on the basis of the information available. The reasons for discontinuance of the hearing will be made part of the report of official findings and the recommendations. The employee and representative, if any, shall be notified in writing of the termination of a hearing.

F. Administrative Law Judge's Report and Recommendations. The report of the Administrative Law Judge shall be in writing and

addressed to the deciding official. The employee or his representative ant the management representative will also receive a copy of the report. The report shall be completed within 30 days after the hearing unless the cause of delay is beyond the Administrative Law Judge's control. The report shall contain, but need not be limited, to the following:

1. Statement of procedural findings.
2. Statement of the issues concerned.
3. Finding as to those reasons found to be sustained and those found not sustained.
4. Conclusions and recommendations.

G. Original Decision. The original decision will be made after full consideration of the record including the transcript of the hearing and the Administrative Law Judge's findings and recommendations. The decision will be made by the deciding official. The decision letter will be documented to indicate which reasons are sustained and which are not sustained; and, if the decision is adverse, it will inform the employee of his right to appeal and the time limit therefore.

H. Hearing Expenses.

1. Regional deciding officials are required to fund all expenses relating to hearings conducted under their jurisdiction, i.e., examiner's fee and travel expenses, etc.
2. Hearings conducted at Headquarters will be funded by the Office of Personnel.

I. Time Limits. The following procedural steps will be completed within time limits specified insofar as possible:

1. The Justice Department will select the Administrative Law Judge within 7 days of their receipt of the employee's request for hearing.
2. The Administrative Law Judge will conduct hearings within 30 days of selection.
3. The Administrative Law Judge will make his statement of findings and recommendations within 30 days after the hearing.
4. The deciding official will provide original decision within 15 days after his receipt of the Administrative Law Judge's report.
5. The Administrator will provide appellate decision within 60 days after his receipt of appeal.

Exceptions to the above time limits may be made only when the cause of delay is beyond control.

Drug Enforcement Administration / U.S. Department of Justice

ADMINISTRATIVE MANUAL
SUPPLEMENTAL TRANSMITTAL

Date 4/29/75

Transmittal No. 132

Chapter No. 06

Table of Changes

Explanation of Changes
This is a pen and ink revision of Section 0674, Discipline, Adverse Actions, Grievances, and Appeals. Delete the title "Administrative Law Judge" and insert "Hearing Examiner" in its place in the following locations.

Paragraph	Lines	Paragraph	Lines
0674.58C	4-5	0674.72D4	3,4-5
0674.58D	1,3,4,9-10	0674.72D5	4
0674.58E	1,2,5-6	0674.72E1	2-3
0674.72B1	2	0674.72E2	3-4,8
0674.72B2	1,4-5	0674.72F	1,2,7
0674.72C1	1-2,4,5	0674.72G	3
0674.72C3	2	0674.72I1	1-2
0674.72C4	2	0674.72I2	1
0674.72C5	1,2	0674.72I3	1
0674.72D2	3	0674.72I4	2-3
0674.72D3	4,7,9,12,15		

Distribution H-1,2,3,7,9
F-1,2,3,4,5,6

"s/_____"
John R. Bartels Jr.
Administrator

Appendix M

Alfred J. Kissell, Appellant,
v.
UNITED STATES POSTAL SERVICE, AGENCY
SF03538810179

Merit Systems Protection Board
[42 M.S.P.R. 154 (1989).]

October 17, 1989

Postal Employee petitioned for review of initial decision dismissing his appeal from denial of his request for restoration under doctrine of res judicata. The Merit Systems Protection Board held that (1) further proceedings were necessary to determine whether claim was barred by doctrine of res judicata, and (2) administrative judge failed to adequately address material issues of fact raise below. Petition granted, initial decision vacated, and case remanded.

1. Merit Protection - key 6
Under doctrine of res judicata, matters resolved by final Board decision in prior appeal by the same party are not properly before Board in subsequent appeal on the same issue; however, exception to doctrine exists where there has been mistake, fraud, concealment, or misrepresentation by defendant.
2. Merit Protection key 438
Merit Systems Protection Board may waive requirement of timely filing of petition for appeal where basis of employee's claim was inherently unknowable due to misrepresentations made by agency.
3. Merit Protection - key 334
On postal employee's appeal from denial of his request for restoration, determination was required of material issue of whether agency misrepresented, at time of employee's earlier request for priority consideration for restoration, that no vacancies were available; if, doctrine of re judicata would not bar employee's appeal and time limit for filing petition for appeal would be waived.
4. Merit Protection - key 465
Initial decision must identify all material issues of fact and law, summarize evidence, resolve issues of credibility, and include administrative judge's conclusions of law, legal reasoning, and authorities on which that reasoning rests. 5 C.F.R. §1201.111(b)(1).

David Anderson, et al., Appellants
v.
Department of Transportation, Federal Aviation Administration, Agency
CH075281F0873

Merit Systems Protection Board
[46 M.S.P.R. 341 (1990).]
Oct 30, 1990

On request for reopening and reconsideration of final decisions sustaining removal of air traffic controllers for their participation in air traffic controllers strike and for being AWOL at that time, the Merit Systems Protection Board held that: (1) Board has authority to reopen and reconsider final decision that it has rendered, even after several years have passed, where there has been fraud, concealment, or misrepresentation by party before the Board; (2) Federal Circuit's affirmance of Board's opinion and order did not preclude Board from considering whether newly discovered evidence showed that agency perpetrated a fraud upon the Board; and (3) proffered new evidence consisting of report of a subcommittee of the House of Representatives concerning falsification of work records at air traffic control facility afforded no basis for reopening appeals for reconsideration. Request denied.

1. Merit Protection - key 474

Merit Systems Protection Board has statutory and regulatory authority to reopen, on its own motion, appeals in which it has rendered a final decision; such authority is consistent with general rule that administrative agencies have power to reconsider decisions on their own initiative, as long as proper notice is given and the right is exercised within a reasonably short period of time. 5 U.S.C.A. § 7701(e)(1)(B); 5 C.F.R. § 1201.117.

2. Merit Protection - key 474

Determination whether to reopen and reconsider a decision, on the Board's own motion involves balancing desirability of finality and the public interest in reaching what ultimately appears to be the right result. 5 U.S.C.A. § 7701(e)(1)(B); 5 C.F.R. § 1201.117.

3. Merit Protection - key 6

Exception to doctrine of res judicata which allows reopening of a decision as a matter of discretion where the decision was obtained by

fraud, concealment, or misrepresentation by party applies to proceedings of the Merit Systems Protection Board.

4. Merit Protection - key 474

Under exception to doctrine of res judicata, Board has authority to reopen and reconsider a final decision that it has rendered, even after several years have passed, where there has been fraud, concealment, or misrepresentation by party before the Board. 5 U.S.C.A. § 7701(e)(1)(B); 5 C.F.R. § 1201.117.

5. Merit Protection - key 474

Mandate of the Court of Appeals for the Federal Circuit in appeals from decision of the Merit Systems Protection Board relates only to record and issues that were before the court, and court's affirmance of Board's opinion and order does not preclude Board from considering whether newly discovered evidence shows that agency perpetrated a fraud upon the Board, of from reopening or reconsidering the case. 5 U.S.C.A. § 7701(e)(1)(B); 5 C.F.R. § 1201.117.

6. Merit Protection - key 474

Although pendency of an appeal to the Federal Circuit deprives the merit Systems Protection Board of jurisdiction to consider a request for reopening, such a request can be considered following Federal Circuit's decision on appeal 5 U.S.C.A. § 7701(e)(1)(B); 5 C.F.R. § 1201.117.

Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioner

v.

National Mines Corporation and Old Republic Insurance Company, Respondents

v.

Island Creek Coal Company, Respondent

Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioner

v.

Kessler Coal Company, Respondent

Nos. 76-1694, 76-1731, 76-1749 and 76-1788

United States Court of Appeals, Fourth Circuit.

554 F.2d 1267 (1977)

Argued Nov. 10, 1976

Decided April 5, 1977

Rehearing Denied June 15, 1977

The Benefits Review Board vacated decisions and remanded black lung cases for hearing before duly appointed administrative law judges, and the Director, Office of Workers' Compensation Programs, Department of Labor, petitioned for review, name as respondents coal companies and their insurance carriers from which miners sought compensation The Court of Appeals, Butzner, Circuit Judge held that Director was a proper party, that 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act governed procedures for adjudication of black lung claims, and that Secretary of Labor had authority to designate hearing officers to adjudicate claims. Vacated and remanded.

4. Administrative law and Procedure - key 443

Administrative hearing conducted by unauthorized officer, is invalid.

Donnelly Garment Co.
v.
National Labor Relations Board
(Donnelly Garment Workers Union et al., Intervernors).

No. 475

Circuit Court of Appeals, Eighth Circuit
123 F.2d 215

Nov 6, 1941

Rehearing denied Jan 6, 1942.

1. Constitutional Law - key 275(2)

In proceedings against employer for violation of National Labor Relations Act, if trial examiner and the National Labor Relations Board ruled erroneously with respect to issues to be tried, or in the exclusion of evidence and drew unwarranted inferences from the evidence adduced, that would not justify a conclusion that either the examiner or the Board was prejudiced or deliberately unfair and that the employer was there by denied "due process of law". See words and phrases, permanent edition, for all other definitions of "Due Process of Law".

3. Master and servant - key 16
Officers - key 103

The Circuit Court of Appeals has power on proper application to conduct an inquiry for purpose of ascertaining whether the National Labor Relations Board or any other administrative agency, the orders of which are subject to review by the court, has accorded to an aggrieved party the full and fair hearing to which he was entitled as a matter of constitutional right. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

4. Master and servant - key 16

All questions touching the regularity and validity of proceedings before an administrative agency such as the National Labor Relations Board are subject to review. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

5. Courts - key 527

Judges of the same court will not knowingly review, reverse or overrule each other's decisions.

6. Courts - key 527

Where judges who constituted the Circuit Court of appeals to which petitions of employer and workers' union to set aside cease and desist order of National Labor Relations Board was finally submitted were not the same judges who originally passed upon the sufficiency of the employer's and the union's applications for leave to adduceadditional evidence and who denied those applications, the court would not, on final submission of case, consider such applications and if court erred in denying an opportunity to prove that the board was not animpartial tribunal, the error was one which properly could be corrected only by the United States Supreme Court. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

12. Constitutional Law - key 275(2)

A refusal by an administrative agency, such as the National labor Relations Board, to receive and consider competent and material evidence offered by a party to a proceeding before it amounts to a denial of "due process of law". National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

14. Judgment - key 210

Master and servant - key 16

A controversy tried before a court or before and administrative agency, such as the National Labor Relations Board, is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

16. Master and Servant - key 16

In proceeding against employer for violation of National Labor Relations Act where competent and material evidence had been excluded, petition of National Labor Relations Board for enforcement of cease and desist order against employer would be denied and case remanded so as to afford the Board an opportunity to cure defects in its procedure by permitting introduction of all competent and material evidence which had been rejected. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

Silas W. Ellerd, Plaintiff-Appellant

v

Southern Pacific Railroad Co., first Dirision of the national Railroad Adjustment Board, the Brotherhood of Locomotive firemane and Entinemen, Defendants-Appellees.

No. 11899

United states Court of Appeals
Seventh Circuit
241 F.2d 541

March 1, 1957

Suit by employee to review and set aside award of National Railroad Adjustment Board and to restore him to employment and seniority rights with defendant carrier. The United States District Court for the Northern District of Illinois, Eastern Division, Phillip L. Sullivan, R., rendered summary judgment for defendants, and plaintiff appealed. The Court of appeals, Lindley, Circuit Judge, held that if employee had been deprived of due process of law by action of union in unauthorizedly representing employee in employee's claim for reinstatement before National Railroad Adjustment Board, award of board would subject to judicial review. Judgment reversed and remanded.

4. Judgment - key 577(2)

In order that doctrine of res judicata apply court whose judgment is asserted as an adjudication, must have been on of competent jurisdiction.

5. Courts - key 23

Plaintiff cannot, by wrongfully invoking jurisdiction of court to do something it was powerless to do, endow court with jurisdiction.

Morris H. Gardner, Petitioner
v.
Federal Communications Commission, and United States of America, Respondents
No. 75-1562

United States Court of Appeals
District of Columbia Circuit
530 F.2d 1086

Submitted Without Arguement
9 Jan 1976
Decided 3 March 1976

Petitioner sought review of the Federal Communications Commission's denial of his petition for reconsideration of a decision dealing with the Commission's personal attack rule. The court of appeals, Wilkey, Circuit Judge, held that the FCC was required to give personal notice to parties as to its decisions; and that where the petitioner's late filing of the petition for reconsideration was due, in substantial measure, to the FCC's failure to give the petitioner personal notice of any kind, the Commission abused its discretion in rejecting his petition for reconsideration on the ground of untimeliness. Remanded.

3. Administrative Law and Procedures - key 416
Agency is bound to obey its own rules.
5. Administrative Law and Procedure - key 441
Once having determined to entertain complaint, agency assumes obligation to assure that proceeding satisfies basic procedural requirements set forth in its own regulations and in Administrative Procedure Act; and whatever would be their standing in court of law on merits of matter before agency, participants in agency action have undeniable interest in seeing to it that procedural rights guaranteed them by law are respected 5. U.S.C.A. § 702.

Glens Falls Indemnity Company, a corporation, Appellant,
v.
United States of America, At the Relation of and to the Use of Westinghouse Electic supply Company, Wm. Radkovich Company, Inc., et al., Appellees
No. 13606

United States Court of Appeals
Ninth Circuit
229 F.2d 370
June 7, 1955

As Amended on Denial of Rehearing
Feb 13, 1956

Action by electrical supplier against prime contractor and subcontractor and their sureties to recover unpaid balance due from subcontractor for materials furnished. Prime contractor and its surety filed cross-claim against subcontractor and surety for recovery if prime contractor were held liable to supplier. Subcontractor also filed cross-claim against prime contractor and surety for unpaid balance on subcontract. The United States District Court for the Southern District of California, Central Division, Jacob Weinberger, J., entered judgment for supplier against prime contractor and its sureties, for prime contractor against subcontractor and its sureties, and for subcontractor for unpaid balance on subcontract, to be off set against prime contractor's judgment against subcontractor's surety, and subcontractor's surety appealed. The court of Appeals, Boldt, district Judge, held that in such action, federal district court properly assumed jurisdiction over prime contractor's cross-claim. judgment affirmed.

4. Courts - key 264(1)

Grant of jurisdiction over particular subject matter includes power to adjudicate all matters ancillary to particular subject matter, and in this regard, word "ancillary" means auxiliary, accessorial or subordinate. See publication Words and Phrases, for other judicial constructions and definitions of "Ancillary".

5. Courts - key 263

A district Court acquires jurisdiction of a case or controversy as an entirety, and hence may, as an incident thereto, possess jurisdiction

of matters of which it would not otherwise have cognizance where the independentlypresented.

6. Courts - key 264(1)

If court has jurisdiction of principal action, it also has cognizance of nay ancillary proceeding therein, regardless of citizenship of parties, amount in controversy or any other factor that would ordinarily determinejurisdiction.

Goldstone v. Payne
No. 207

Circuit Court of Appeals, Second Circuit
94 F.2d 855
February 14, 1938

4. Courts - key 24

Where a court had jurisdiction over the subject matter of an action, defendant may submit himself to the court and thereby confer upon it jurisdiction over his person, but where the court lacks jurisdiction over the subject matter of the case, the defect is not cured by getting personal jurisdiction of the defendant.

5. Courts - key 24

A want of jurisdiction over the subject matter of the case cannot be waived by pleading of any other form of consent, not even by going totrial.

8. Courts - key 27

Where a court had jurisdiction of an original suit, a cross complaint or counter claim is treated as ancillary, and the court will entertain the ancillary suit though it could not have entertained it as an independent suit.

Margaret Klugh et al
v.
United States of America Department of Agriculture et al
Civ. A. No. 73-95

U.S. District Court
D. South Carolina
Greenwood Division
620 F. Supp. 892 (D.C.S.C. 1985)

Various lineal descendants of testator who died in 1881 alleged that, as devises under the will, they had property interests in land previously owned by testator and purported acquired by the United states in several condemnation proceedings under the Weeks Act, and thus, sought return of the land and an accounting by United States for use of land since date of purportedly taking. On remand from the Court of Appeals, 588 F.2d 45, the District Court, Blatt. J., on cross motions for summary judgment, held that:(1) statute of limitations was no defense as to heir's action seeking title to the land; (2) complaint put federal Government on notice that lack of proper consent was in issue and, thus, entitled heirs to submit factual guardian ad litem aspects of consent claim as basis of recovery on their motion for summary judgment; (3) condemnation judgments as to interests of heirs who were ;unborn and not represented in condemnation proceedings by guardian ad litem were void; and (4) condemnation judgments, for equitable considerations, were to be set aside as to interests of heirs who were unknown at time of condemnation judgments and who were not represented by guardian ad litem and known minor and incompetent heirs who received inadequate guardian ad litem representation. Order in accordance with opinion.

2. Federal Civil Procedure - key 2642
Judgment - key 486(1)
Void judgment is subject to both direct and collateral attack.
3. Judgment - key 501
Generally, voidable judgment is subject only to direct, not collateral attack.
12. Federal Civil Procedure - key 2393
Judgment is a "void judgment" if court that rendered judgment lacked jurisdiction of the subject matter, of the parties, of acted in a manner inconsistent with due process. Fed. Rules Civ. Prc., Rule

60(b)(4), 28 U.S.C.A.; U.S.C.A. Const. Amend. 5. See publication Words and Phrases for other judicial constructions and definitions.

13. Federal Civil Procedure - key 2653

Mere error does not render a judgment void, for purposes of obtaining relief from the judgment under Rule 160(b)(4), unless the error is of constitutional dimension. Fed. Rules Civ. Proc. Rule 60(b)(4), 28 U.S.C.A.

19. Federal Civil Procedure - key 2656

Court may set aside a judgment pursuant to Rule 60(b)(6) when compelled by unusual or exceptional circumstances. Fed. Rules Civ. Prc. Rule 60(b)(6), 28 U.S.C.A.

21. Federal Civil Procedure - key 2641

If proper circumstances are presented Rule 60(b)(6), governing relief from a judgment for unusual or exceptional circumstances, should be given liberal construction to the end that justice is accomplished. Fed. Rules Civ. Proc. Rule 60(b)(6), 28 U.S.C.A.

28. Federal Civil Procedure - key 2662

Pursuant to Rule 60(b), judgments may be reopened, modified, corrected, set aside, and vacated. Fed. Rules Civ. Proc. Rules 60(b), 28 U.S.C.A.

Ray Marshall, Secretary of Labor, United States Department of Labor,Appellee
v.
Board of Education, Bergenfield, New Jersey, et al
No. 77-1530

United States Court of Appeals,
ThirdCircuit
575 F.2d 417 (1978)

Submitted Under Third Circuit Rule 12(6) - Jan 5, 1978
Decided March 13, 1978

Secretary of Labor brought suit to enjoin city board of education from violating certain provisions of the Fair Labor Standards Act which set minimum wages and maximum hours for employees. The United States District Court for the District of New Jersey, Fredrick B. Lacey, J., entered judgment for the Secretary, ordering future overtime payments and compliance by the board with the Act's record-keeping provisions, and payment of withheld past wages. The court of Appeals summarily affirmed, 530 F.2d 964. Thereafter, in an unrelated case, the Supreme court held that the states need not comply with federal wage and hour legislation, and the board then moved to vacate the district court judgment. The District Court, Frederick B. Lacey, J., vacated so much of its judgment as related to the prospective operation of its decree but refused to vacate its award of past wages, and the board appealed. The Court of Appeals, Garth, Circuit Judge, held that (1) the aforesaid Supreme Court decision did not render the district court's judgment void or divest it of jurisdiction ab imto, (2) the failure of the board to do other than characterize the district court's action as "unequitable" was insufficient to establish the showing required for modification of a final judgment, and (3) a judgment at law for damages for past wrongs is "inherently final" and remains unaffected by a subsequent change in the law.

1. Federal Civil Procedure - key 2651, 2653
A judgment may be void therefore subject to relief under federal rule, if the court that rendered it lacked jurisdiction of the subject matter or the parties or entered "a decree which is not within the powers granted to it by the law";

Don Morrow, Appellant
v.
District of Columbia, Appellee. In the matter of Harry T. Alexander, Judge, District of Columbia Court of General Sessions.

Nos. 22126,22131

United States Court of Appeals
District of Columbia Circuit

417 F.2d 728 (1969)
Argued Feb 14, 1969.
Decided april 18, 1969

Petition by government for writs of mandamus and prohibition to compel a judge sitting in Criminal Division of Court of General Sessions to vacate an order respecting nondisclosure of defendant's arrest record and to restrain him from further proceeding pursuant to that order. The District of Columbia Court of Appeals gave judgment holding, inter alia, that lower court had no ancillary jurisdiction to issue such an order, 243 A.2d 901k and appeal was taken. The Court of Appeals, J. Skelly Wright, Circuit Judge, held inter alia, that District of Columbia court of General Sessions had power, under the theory of "ancillary jurisdiction", to issue an order regarding dissemination of defendant's arrest record, where the arrest was an integral part of the criminal proceeding, the order prohibiting dissemination of arrest record did not require an independent fact finding process, and the order did not deprive the Districtgovernment of a procedural right such as trial by jury. Reversed and remanded. Tann. Circuit Judge, dissented in part. For decision after remand see 259 A.2d 592.

10. Courts - key 27
All courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction.
12. Courts - key 264(1)
"Ancillary jurisdiction" theory of federal court means that once federal jurisdiction properly attaches to primary case court also has jurisdiction over certain subsidiary or subordinate disputes even though it might not independently be able to proceed to adjudicate them. See publication Words and Phrases for other judicial constructions and definitions.

13. Courts - key 27

"Ancillary jurisdiction" should attach where: (1) ancillary matter arises from same transaction which was basis of main proceeding, or arises during course of main matter, or is an integral part of the main matter; (2) ancillary matter can be determined without a substantial new fact finding proceeding; (3) determination of ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) ancillary matter must be settled to protect integrity of main proceeding or to insure that disposition in main proceeding will not be frustrated.

Page v. Wright
No. 7328

Circuit Court of Appeal
Seventh Circuit
116 F.2d 449

Dec 12, 1940

2. Courts - key 23, 37(1)

Jurisdiction cannot be conferred upon federal court by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising jurisdictional question by any form of laches, waive or estoppel. Jud. Code § 37, 28 U.S.C.A. § 80.

Rocovich v. U.S.
933 F.2d 991
(6th Fed. Cir. 1991)

Note 6. Rocovich claims in this appeal that certain information obtained from the government after the Claims court's judgment demonstrates deliberate misrepresentation and fraudulent conduct by government representatives regarding the original assessment date. The government denies any such misconduct, and points out that Rocovich's charge have been investigated by the Department of Justice's Office of Professional Responsibility and have been determined to be unfounded. If Rocovich believes that the Claims Court's judgment was obtained by fraud or misrepresentation he should seek relief from that court.

Samuel J. Jordan et al., Plaintiffs-Appellees,
v.
John J. Gilligan et alk Defendants-Appellants
No. 73-1973

United States Court of Appeals
Sixth Circuit
500 F.2d 701

Argued Feb. 1, 1974
Decided July 18, 1974

Plaintiffs, which were successful in suit challenging reapportionment plan for the Ohio Legislature were awarded attorney fees. The United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, denied defendants' motion to vacate aware, and defendants appealed. The court of Appeals, John W. Peck, Circuit Judge, held that a void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether is should be set aside, that state officials are not immune from suits brought to restrain unconstitutional acts undertaken in their official capacities, that if a party is immune from an aware of attorney fees as such that immunity is not altered by taxing such fees as part of the costs, that decisions of the United States supreme Court rendered by written opinions are binding on all courts, that the Eleventh Amendment prohibits award of attorney fees against unconsenting sovereign states and that the State of Ohio was not precluded from attacking award either on theory of res judicata or waiver. Award of attorney fees vacated.

1. Federal Civil Procedure - key 2642
Judgment - key 486(1)
A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside. Fed. Rules civ. Proc. rule 60(b), 28 U.S.C.A.
9. Courts - key 96(3), 97(1)
Decisions of the United states Supreme court rendered by written opinions are binding on all courts, state and federal; the Court's holding is stare decisis and cannot be overruled except by the Court itself; even the Court's dicta is of persuasive precedential value.
13. Judgment - key 486(1)
A void judgment is no judgment at all and is without legal effect.

14. Federal Civil Procedure - key 2641

Doctrineof res judicata does not preclude a litigant from making a direct attack, as by way of motion to vacate, on a judgment before the court which rendered it. Fed. Rules Civ. Proc. rule 60(b), 28 U.S.C.A.

15. Federal Civil Procedure - key 2661

A party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of failure to object prior to, or at time of, entry of judgment. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

William Vincent Vitarelli, Petitioner,
v.
Fred A. Seaton, Secretary of the Interior, et al

359 US 535, 3 L.ed 2d 1012, 79 S.Ct. 968
[No. 101]
Argued April 1 and 2, 1959
Decided June 1, 1959

After an administrative hearing, the plaintiff, an employee of the Department of the Interior, whose employment rights were not protected by the Civil Service Act or any other federal statute, was notified that he was discharged from service in the interests of national security. After he filed a suit in the United States District Court for the District of Columbia for a declaration that his dismissal had been illegal and for an injunction requiring his reinstatement, a copy of a new notification, carrying the date of the original notification, and reciting that it was a revision thereof and replaced it, but omitting any reference to the reason for his discharge and to the authority under which it was carried out, was filed in the District Court and delivered to the plaintiff. The District Court granted summary judgment for the defendant. That judgment was affirmed by the Court of Appeals for the District of Columbia Circuit, one judge dissenting. (102 App DC 316, 253 F2d 338.)

On certiorari, the Supreme Court reversed the judgment below. In an opinion by Harlan, J., It was held that although the department had power to dismiss the plaintiff without giving any reasons, it was bound to afford him the procedural safeguards provided in an order relating to discharges of government employees on security grounds, since the plaintiff's discharge was based on such grounds. It was also held that these procedural safeguards were violated in that the charges served upon the plaintiff at the time of his suspension did not specify charges later investigated at the administrative hearing; that irrelevant matter was considered at the hearing; and that he was not allowed to cross-examine a witness identified but not produced at the hearing.

As to the additional question whether the new notification, omitting any reference to the reason for plaintiff's discharge, could be viewed as an exercise of the department's summary dismissal power, the court was divided. a majority of five of the justices held that, under the circumstances, the new notification was not a exercise of the summary dismissal power. On the other hand, Frankfurter, J., with the concurrence of Clark, Whittaker, and Stewart, JJ., dissented from

that holding, expressing the view that the new notification was an effective prospective, though not retroactive, exercise of that power.

2. United States §79.5 - discharge of employees - national security safeguards.

The Secretary of the Interior is obligated to conform to the procedural standards formulated by him in an order for the dismissal of employees on security grounds, where he attempts to discharge an employee without giving reasons because the employee had not protected employment rights and even though, without his own regulations, he could have discharged the employee summarily.

4. Administrative Law §§ 102, 103; United States § 79.5 - employees - dismissal on security grounds - departmental rules of procedure.

Scrupulous observance of departmental procedural safeguards provided for the discharge of a government employee on security grounds is of particular importance, and departures from such regulations involve more that mere consideration of procedural irregularities, in view of the nature of the proceedings, in which the ordinary rules of evidence do not apply, matters involving the disclosure of confidential information are withheld, and counsel of the employee is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a cause being tried in a court of law.

8. Administrative Law §; United States § 79.5 - employees - dismissal - departmental regulations.

The dismissal of an employee from government service on grounds of national security is illegal and of no effect where the proceedings attendant upon such dismissal fell substantially short of the requirements of the applicable departmental regulations.

10. United States § 79.5 - employee - dismissal.

A government employee, who though his employment rights were not protected by the Civil Service Act or any other federal statute, was dismissed on security grounds in a proceeding which violated the procedural safeguards of the pertinent departmental regulations, is entitled to reinstatement, even though the notice of dismissal on security grounds was subsequently replaced by on omitting any reference to the reason for the employee's discharge; however, the reinstatement is subject to any lawful exercise of the power of dismissal.

11. Administrative Law § 103 - rules of procedure.

An executive agency must be rigorously held to the standards by which it professes its action to be judged; accordingly, if dismissal

from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. [From separate opinion by Frankfurter, Clark, Whitaker, and Stewart, JJ.]